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UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF CALIFORNIA

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2 **NOT FOR PUBLICATION**

3 **UNITED STATES BANKRUPTCY COURT**
4 **EASTERN DISTRICT OF CALIFORNIA**

5
6 In re:) Case No. 11-35381-D-7
7 MARK CAMERON SCOTT,)
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15)
16 In re:) Case No. 11-36226-D-7
17 ROBERT GRAY SCOTT and)
18 TERESA SCOTT,)
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This memorandum decision is not approved for publication and may
not be cited except when relevant under the doctrine of law of
the case or the rules of claim preclusion or issue preclusion.

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MEMORANDUM DECISION

2 On or about January 8, 2013, plaintiffs Zurich American
3 Insurance Company, et al. (collectively "Zurich"), submitted a
4 proposed judgment on the court's order granting Zurich's motion
5 for summary judgment in part (the "proposed judgment"). On
6 January 10, 2013, defendants Mark C. Scott and Robert Gray Scott
7 (the "defendants") filed an Objection to Proposed Judgment and
8 Request for Hearing (the "Objection"), contending (1) that the
9 defendants' pending appeal has divested this court of
10 jurisdiction to enter the proposed judgment; (2) that Zurich is
11 not entitled to pre-judgment interest; and (3) that the date for
12 the accrual of pre-judgment interest, as stated in the proposed
13 judgment, is arbitrary and without basis in the evidence. On
14 January 16, 2013, Zurich filed opposition to the Objection.
15 Having considered all of these, the court will sustain the
16 Objection in part and enter a revised judgment. The court
17 declines both parties' requests for a further briefing schedule
18 and hearing.

I. JURISDICTION TO ENTER THE JUDGMENT

20 The defendants base their jurisdiction argument on the rule
21 that "the filing of a notice of appeal from the final judgment of
22 a trial court divests the trial court of jurisdiction and confers
23 jurisdiction upon the appellate court." In re Transtexas Gas
24 Corp. v. TransTexas Gas, 303 F.3d 571, 578-79 (5th Cir. 2002).
25 However, in this case, the order the defendants have appealed
26 from is not a final order, and thus, the rule does not apply.

27 On November 15, 2012, this court entered the following
28 minute order on Zurich's motion for summary judgment:

1 IT IS ORDERED that the motion is granted in part, and
2 judgment will be entered in favor of the plaintiff and
3 against the defendants, jointly and severally, in the
amount of \$898,402.94, which judgment will be
nondischargeable pursuant to 11 U.S.C. § 523(a)(4).
4 Counsel for the plaintiff shall submit a judgment
consistent with the court's ruling.

5 The minute order is clearly not a final order, as it merely
6 announced that judgment would be entered in Zurich's favor, and
7 announced the terms on which judgment would be entered. The
8 minute order expressly contemplated that a judgment would be
9 submitted by Zurich's counsel. Nevertheless, on November 28,
10 2012, the defendants filed a notice of appeal from "the judgment,
11 order, or decree of the bankruptcy judge granting in part
12 Plaintiff's motion for summary judgment" The notice of
13 appeal was filed before Zurich's counsel had submitted a proposed
14 judgment, as called for by the minute order, and before the court
15 had entered a judgment.

16 In these circumstances, Fed. R. Bankr. P. 8002(a) has come
17 into play, which provides that "[a] notice of appeal filed after
18 the announcement of a decision or order but before entry of the
19 judgment, order, or decree shall be treated as filed after such
20 entry and on the day thereof." The rule that the filing of a
21 notice of appeal from a final order or judgment divests the trial
22 court of jurisdiction is not in play here, because this court has
23 not entered a final order or judgment.

24 II. RIGHT TO PRE-JUDGMENT INTEREST

25 Next, the defendants contend the damages in this case were
26 not certain or capable of being made certain by calculation, and
27 thus, that Zurich is not entitled to the pre-judgment interest it
28 has included in the proposed judgment. Zurich, on the other

1 hand, contends it is entitled to such interest pursuant to Cal.
2 Civ. Code § 3287(a), which provides:

3 Every person who is entitled to recover damages
4 certain, or capable of being made certain by
5 calculation, and the right to recover which is vested
6 in him upon a particular day, is entitled also to
recover interest thereon from that day, except during
such time as the debtor is prevented by law, or by the
act of the creditor from paying the debt.

7 This provision is intended to compensate the plaintiff for
8 loss of use of the funds awarded by the judgment during the pre-
9 judgment period. Howard v. American National Fire Ins. Co., 187
10 Cal. App. 4th 498, 535 (2010), citing Lakin v. Watkins Associated
11 Industries, 6 Cal. 4th 644, 663 (1993). "Courts generally apply
12 a liberal construction in determining whether a claim is certain,
13 or liquidated. The test for determining certainty under section
14 3287(a) is whether the defendant knew the amount of damages owed
15 to the claimant or could have computed that amount from
16 reasonably available information." Howard, 187 Cal. App. 4th at
17 535, citing Chesapeake Industries, Inc. v. Togova Enterprises,
18 Inc., 149 Cal. App. 3d 901, 907 (1983).

19 That a defendant disputes liability on the claim does not
20 defeat the plaintiff's right to pre-judgment interest. Howard,
21 187 Cal. App. 4th at 535, citing Boehm & Associates v. Workers'
22 Comp. Appeals Bd., 76 Cal. App. 4th 513, 517 (1999). "Moreover,
23 only the claimant's damages themselves must be certain. Damages
24 are not made uncertain by the existence of unliquidated
25 counterclaims or offsets interposed by the defendant." Howard,
26 187 Cal. App. 4th at 536, citing Chesapeake Industries, 149 Cal.
27 App. 3d at 907.

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1 The test for determining the certainty of damages was
2 illuminated in Esgro Cent., Inc. v. General Ins. Co., 20 Cal.
3 App. 3d 1054 (1971), in which the trial court had denied pre-
4 judgment interest on damages awarded under a fire insurance
5 policy and a business interruption insurance policy. On appeal,
6 the court reversed as to the damages under the fire insurance
7 policy, finding that the parties' disputes as to the value of the
8 property destroyed (and hence, the plaintiff's damages) were
9 minor. Id. at 1061. On the other hand, the court affirmed the
10 denial of interest on the damages under the business interruption
11 policy, because the computation of those damages required "a
12 judicial determination to be made from conflicting evidence."
13 Id. at 1063.

14 The extent of business interruption loss depended upon
15 a projection of appellants' earnings based upon past
16 experience, a fact that may or may not have been
17 determinable from past data, and upon a determination
18 of the permissible duration of the interruption of
19 business, a fact which most certainly was not readily
20 determinable on the facts here present. The jury, on
21 conflicting evidence, was required to ascertain what
22 period of interruption was appropriate in view of two
23 factors: the obligation of due diligence imposed by
24 the policy upon appellants; and the provisions of the
25 policy excusing appellants from the effects of unduly
26 prolonged business interruption caused by others
27 interested in the building over whom they had no
28 control.

22 Id.
23 In General Ins. Co. v. Commerce Hyatt House, 5 Cal. App. 3d
24 460 (1970), the court affirmed an award of pre-judgment interest
25 on amounts due to a building contractor for extra work, from the
26 date the contractor provided an itemized accounting to the
27 defendant, 5 Cal. App. 3d at 473-75, where "the only substantial
28 matter in dispute was the amount to which [the defendants] were

1 entitled by way of setoff." Id. at 475. However, in Conderback, Inc. v. Standard Oil Co., 239 Cal. App. 2d 664, 690-91 (1966),
2 pre-judgment interest was denied where there was "no single
3 contractual document in which the sum due or the means of
4 calculating it [were] clearly provided for. Indeed, according to
5 plaintiff's theory, compensation [was] predicated on an 'open
6 ended' purchase order involving application of a pricing formula
7 and negotiations between the parties, all in accordance with a
8 prior course of dealing." And in Block v. Laboratory Procedures, Inc., 8 Cal. App. 3d 1042, 1046 (1970), the court denied pre-
9 judgment interest because, although the calculation of damages
10 depended on the market value of a company's stock, there was no
11 evidence of an established market for that stock.
12

13 The computation of damages in this case was essentially a
14 mathematical exercise, not requiring factual findings on
15 subjective questions like projections of lost earnings, pricing
16 formulas, or market value of a company's shares. Thus, in the
17 court's view, the amount of Zurich's damages was calculable from
18 reasonably available information.
19

20 The defendants' argument is that "the damages figure of
21 \$898,402.94 was determined only after conflicting evidence was
22 reviewed by the court and the court chose a figure which both
23 parties disagreed with." Objection, 4:24-26. In fact, that
24 figure, down to the penny, comes from a letter written by the
25 defendants' counsel to Zurich's counsel in which he stated that
26 "Trans Cal [the defendants' company] has recomputed their balance
27 due according to the figures submitted with your recent letter.
28 Their calculations show a balance due in the amount of

1 \$898,402.94 which they will agree is the debt owed to Zurich."
2 Appendix of Exhibits in Support of Plaintiffs' Motion for Summary
3 Judgment, filed Aug. 1, 2012, Ex. A, p. 56.

4 The court acknowledges that the defendants withdrew that
5 figure at some point during the two and one-half years after the
6 letter was written and before the court heard Zurich's motion for
7 summary judgment, and also acknowledges that "a theme of the
8 court's [ruling] was the uncertainty as to the damages figure."
9 Objection, 5:2-3.

10 What the court's ruling made clear and the defendants
11 overlook, however, is that the uncertainty as to the amount of
12 the damages was caused by the defendants, who failed to offer any
13 figure of their own as the amount due, despite the fact that
14 Zurich's claim was for insurance premiums collected by the
15 defendants and withheld from Zurich. The defendants failed to
16 offer any documentation of their own until after the evidentiary
17 record on Zurich's summary judgment motion had closed, when the
18 defendants suddenly came up with copies of the front sides of
19 some 200 checks. They offered those copies with the conclusory
20 statement that the amounts of the checks should be credited
21 against any balance due Zurich, but with no admissible evidence
22 as to whether the checks had actually been negotiated or how they
23 tied in with the debt to Zurich. Further, short of accepting the
24 defendants' unsupported conclusion, there was no way for the
25 court to determine that those amounts had not already been
26 accounted for in the accounting produced by Zurich.

27 Although the defendants persisted in claiming that Zurich
28 would have the most complete records, and that Zurich had failed

1 to turn over those records to the defendants, the defendants made
2 no attempt to obtain those records through discovery. Further,
3 they never denied that they themselves had records from which the
4 amount of the claim might be ascertained; that they in fact had
5 such records seems clear from their belated production of the 200
6 checks. In short, the court has no reason to believe the
7 defendants did not know and could not have determined, from
8 reasonably available information, the precise amount due Zurich
9 on account of insurance premiums the defendants collected and
10 failed to turn over. That they failed to make any attempt to
11 ascertain that amount, either from their own records or from
12 Zurich's, for more than two and one-half years should not accrue
13 in their favor.

14 III. ACCRUAL DATE FOR PRE-JUDGMENT INTEREST

15 Finally, the defendants contend the date used by Zurich in
16 the proposed judgment, January 1, 2010, as the accrual date for
17 pre-judgment interest is arbitrary and without foundation in the
18 evidence. Zurich has not addressed this issue in its opposition.

19 It is not disputed that the parties terminated their
20 business relationship effective December 31, 2009. On March 5,
21 2010, Zurich provided an accounting to the defendants' attorney
22 of the amounts Zurich claimed were due. On March 15, 2010, the
23 defendants' attorney wrote the letter described above in which he
24 stated that Trans Cal had recomputed the figures and come up with
25 a balance due of \$898,402.94. Although the defendants later
26 asserted they were entitled to various setoffs and credits
27 against that amount, they never demonstrated by admissible
28 evidence the amounts of those setoffs and credits, and failed to

1 seek additional records from Zurich by way of discovery. The
2 court finds that March 15, 2010, the date on which the
3 defendants' counsel acknowledged the amount of the debt to be the
4 amount this court ultimately determined is due, was the date on
5 which the amount of Zurich's damages was certain or readily
6 calculable by the defendants; pre-judgment interest will run from
7 that date.

8 For the reasons stated, the court overrules the Objection
9 except as to the date of accrual of pre-judgment interest. The
10 court will issue an appropriate order and judgment.

11 Dated: Feb. 11, 2013

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ROBERT S. BARDWIL
United States Bankruptcy Judge

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